

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 10..07..2007

C O R A M

The Honourable Mr. A.P. Shah, Chief Justice
and
The Honourable Mr. Justice P. Jyothimani

Writ Appeal No.860 of 2007

The Management of Tamil Nadu
State Transport Corporation
(Villupuram Division-III) Ltd.,
Kancheepuram.

.. Appellant

Versus

R. Gnanasekaran

.. Respondent

Prayer : Appeal filed under Clause 15 of the Letters Patent against the order of a learned single Judge of this Court dated 26.4.2006 passed in W.P. No.30081 of 2003. The Petition presented to this court under Article 226 of Constitution of India, to issue a writ of Certiorarified mandamus calling for the records relating to the order in Proceedings No.3301/Pa-2/TNSTC (Vill, Div-3)/2000, dt.19.4.2000 passed by the respondent discharging the petitioner from service on medical ground and the order in proceedings No.3301/P2/TNSTC(VPM DVN-III)/2000, dt.19.9.2001 passed by the respondent terminating the petitioner's services from the post of Non-Tech-Helper, quash the same and consequently direct the respondent to provide the petitioner employment in the post of Non-Tech-Helper or in any other suitable post with pay protection and continuity of service with backwages and all consequential benefits.

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For Appellant : Mr. G. Muniratnam
For Respondent : Mr. D. Hariparanthaman
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J U D G M E N T

(Delivered by the Honourable Chief Justice)

Admit. Learned counsel appearing for the respondent waives service. By consent, the appeal is taken up for hearing.

2. This appeal is directed against the judgment and order passed by N. Paul Vasanthakumar, J., whereby he has quashed the orders of the appellant Corporation dated 19.4.2000 and 19.9.2000 and directed the appellant Corporation to reinstate the respondent workman into service within a period of two weeks with pay protection, continuity of service, backwages, etc. The brief facts leading to this appeal are stated hereunder.

3. The respondent workman initially joined service in the appellant Corporation as Conductor in the year 1992 and subsequently, the Employment Exchange sponsored his name for the post of Driver and thus, the respondent was appointed as Driver in the appellant Corporation by order dated 2.5.1994. On completion of 240 days of service, his services were confirmed. While the respondent was working in the Kancheepuram Depot of the appellant Corporation, on 2.1.1999, when he was returning home after completing duty, met with an accident and sustained injury on his right leg. The respondent was admitted in the C.M.C., Vellore and underwent surgery. During treatment, the respondent applied for medical leave and the same was sanctioned from 2.1.1999 to 11.1.2000. After treatment, the respondent was given duty as Driver. However, due to the injury sustained, the respondent could not move his right leg freely as earlier. Hence, by representation dated 1.2.2000, he requested the appellant Corporation to provide him light duty. Pursuant to the said request, by order dated 5.2.2000, the appellant Corporation requested the Medical Board to give a report as to whether the respondent was fit for the post of Driver. After examination, the Medical Board, by report dated 29.3.2000, opined that the respondent was unfit for the duty of Driver as he had lost his knee movement and there was no possibility to regain the normal movement. Based on the said report, the appellant Corporation issued a show cause notice on 4.4.2000 and directed the respondent to show cause as to why he should not be discharged from service on medical grounds. The respondent submitted his explanation on 11.4.2000 and requested the appellant Corporation to provide him alternate employment/light duty. However, without considering the explanation, the respondent was discharged from service by the order dated 19.4.2000. Thereafter, based on a

Government Order and the settlement regarding alternate employment, by order dated 28.3.2001, the appellant Corporation provided alternate employment and appointed the respondent as Helper (Non-Tech), i.e., Office Assistant and he was posted to the Personnel Section in the Head Office. The respondent joined duty on 6.4.2001 and worked continuously. However, by order dated 19.9.2001, the respondent was terminated from service with immediate effect without giving any notice or assigning any reason. Though the respondent made several representations seeking alternate employment, no reply was given by the appellant Corporation. Hence, the present writ petition has been filed by the respondent workman seeking to quash the orders of the appellant Corporation dated 19.4.2000 and 19.9.2001 and for consequential reliefs. The learned Judge, following the decision of the Supreme Court in *Kunal Singh vs. Union of India & Another* [(2003) 4 S.C.C. 524] and a Division Bench decision of this Court in *Metropolitan Transport Corporation vs. The Presiding Officer, Principal Labour Court & Another* [2004 W.L.R. 398], held that the termination of the services of the respondent workman was in violation of the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (Act 1 of 1996) (hereinafter referred to as 'Disabilities Act') and directed reinstatement of the respondent workman with pay protection, continuity of service and backwages. Being aggrieved, the appellant Corporation has filed this appeal.

4. Mr. G. Muniratnam, learned counsel appearing for the appellant Corporation strenuously contended that Section 2(t) of the Disabilities Act defines 'person with disability' to mean a person suffering from not less than 40% of any disability as certified by a medical authority. Learned counsel contended that Chapter VIII of the Disabilities Act deals with 'non-discrimination' and under Section 47, there is a prohibition of discrimination in Government employment in respect of an employee who acquires a disability during his service. Learned counsel urged that from a conjoint reading of the definition of 'person with disability' and Section 47 of the Disabilities Act, it would be evident that those persons who acquire disability, i.e., more than 40% during service, his/her service cannot be dispensed with or he/she reduced in rank, though it is open to the employer to shift such employee to some other post with the same pay scale and service benefits and in the absence of such post, to keep him/her on a supernumerary post or such post until a suitable post is made available or till the person attains the age of superannuation. Learned counsel submitted that there is nothing on record that the respondent was a person with disability as defined under Section 2(t) of the Disabilities Act and whether

the disability was more than 40%. Learned counsel further submitted that no such certification has been made by any medical board and in the absence of any such report, the respondent cannot ask for any benefit under Section 47 of the Disabilities Act. In support of this submission, learned counsel placed reliance on an unreported decision of a Division Bench of this Court in General Manager, Tamil Nadu State Transport Corporation vs. A. Sengaan (Writ Appeal M.D. No.96 of 2007) decided on 26.4.2007.

5. On the other hand, Mr. Hariparanthaman, learned counsel appearing for the respondent workman submitted that the term 'disability' used in Section 47 of the Disabilities Act is different from the term 'person with disability' as defined under Section 2(t) of the Act. Learned counsel submitted that the term 'disability' is defined under Section 2(i) of the Act, and includes locomotor disability. Learned counsel submitted that the Supreme Court in Kunal Singh's case (supra) has clearly held that acquisition of disability is not the same as a person with disability and it is not necessary to establish that the workman has suffered 40% disability. Learned counsel also brought to our notice a recent decision of a Division Bench of this Court in G. Muthu vs. Management of Tamil Nadu State Transport Corporation (Madurai) Limited [2007 (1) L.L.J. 9], where a view has been taken that the term 'disability' used in Section 47 of the Disabilities Act would encompass not only those contained in Section 2(i), but also those which disabled a person from performing a work which he held immediately prior to acquisition of such disability. He submitted that the S.L.P. filed by the Transport Corporation against this judgment has been dismissed by the Supreme Court. Learned counsel, however, added that as far as the present respondent is concerned, he is suffering from locomotor disability which is defined in Section 2(o) of the Disabilities Act to mean disability of the bones, joints or muscles leading to substantial restriction of the movement of the limbs or any form of cerebral palsy and it is included in the definition of 'disability' in Section 2(i) of the Disabilities Act.

6. For proper appreciation of the rival submissions of the learned counsel for the parties, it is useful and necessary to notice a few definitions contained in Section 2 and Section 47 of the Disabilities Act :

"2. Definitions. - In this Act, unless the context otherwise requires, -

(a) - (d)

(e) ' cerebral palsy' means a group of non-progressive conditions of a person characterized by

abnormal motor control posture resulting from brain insult or injuries occurring in the prenatal, perinatal or infant period of development;

(f) - (h)

(i) 'disability' means -

(i) - (iv)

(v) locomotor disability;

(vi) - (vii)

(j)

(k) 'establishment' means a corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a local authority or a government company as defined in Section 617 of the Companies Act, 1956 (1 of 1956) and includes departments of a Government;

(l) - (n)

(o) 'locomotor disability' means disability of the bones, joints or muscles leading to substantial restriction of the movement of the limbs or any form of cerebral palsy;

(p) - (s)

(t) 'person with disability' means a person suffering from not less than forty per cent of any disability as certified by a medical authority;

(u) - (v)

(w) 'rehabilitation' refers to a process aimed at enabling persons with disabilities to reach and maintain their optimal physical, sensory, intellectual, psychiatric or social functional levels;

... .."

Section 47 of the Disabilities Act reads as follows :

"47. Non-discrimination in government employment.-

(1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service:

Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits:

Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.

(2) No promotion shall be denied to a person merely on the ground of his disability:

Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section."

7. According to the respondent workman, his disability falls under Section 2(i)(v), namely locomotor disability. There is no dispute that the Disabilities Act applies to establishment of the appellant Corporation and this establishment is not exempted under any notification issued under Section 47 of the Act. 'Person with disability' means a person suffering from not less than 40% of any disability as certified by a medical authority as per the definition given under Section 2(t) of the Act. From the facts which are not in dispute, it is clear that the disability suffered by the respondent workman is covered by Section 2(i)(v) read with Section 2(o) of the Disabilities Act. It is also not in dispute that this disability was acquired by the respondent during his service. Under Section 2 of the Act, 'disability' and 'person with disability' are separately defined and they are distinct. We may also refer to some provisions in Chapter VI of the Act relating to employment. Section 32 deals with identification of posts which can be reserved for persons with disabilities. Section 33 speaks of reservation of such percentage of vacancies not less than 3% for persons or class of persons with disability, of which 1% each shall be reserved for persons suffering from (i) blindness or low vision; (ii) hearing impairment; and (iii) locomotor disability or cerebral palsy. Section 38 requires the appropriate Governments and local authorities to formulate schemes for ensuring employment of persons with disabilities. Section 47 is included in Chapter VIII of the Act. Chapter VI deals with employment relating to persons with disabilities including identification of posts and reservation of vacancies for such persons. Under this Chapter, reservation of vacancies for persons with disabilities is made for initial appointment. Section 47 in Chapter VIII deals with an employee of an establishment who acquires a disability during his service.

8. The provisions of Section 2 read with Section 47 of the Disabilities Act fell for consideration of the Supreme Court in Kunal Singh vs. Union of India (supra). The Court highlighted the distinction between the terms 'disability' and 'person with disability' and held that Section 47 contemplates a disability acquired during service. Shivaraj Patil, J., speaking for the Bench, observed as follows : (SCC pp.529&530)

"Chapter VI of the Act deals with employment relating to persons with disabilities, who are yet to secure employment. Section 47, which falls in Chapter VIII, deals with an employee, who is already in service and acquires a disability during his service. It must be borne in mind that Section 2 of the Act has given distinct and different definitions of "disability" and "person with disability". It is well settled that in the same enactment if two distinct definitions are given defining a word/expression, they must be understood accordingly in terms of the definition. It must be remembered that a person does not acquire or suffer disability by choice. An employee, who acquires disability during his service, is sought to be protected under Section 47 of the Act specifically. Such employee, acquiring disability, if not protected, would not only suffer himself, but possibly all those who depend on him would also suffer. The very frame and contents of Section 47 clearly indicate its mandatory nature. The very opening part of the section reads "no establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service". The section further provides that if an employee after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits; if it is not possible to adjust the employee against any post he will be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier. Added to this no promotion shall be denied to a person merely on the ground of his disability as is evident from sub-section (2) of Section 47. Section 47 contains a clear directive that the employer shall not dispense with or reduce in rank an employee who acquires a disability during the service. In construing a provision of a social beneficial enactment that too dealing with disabled persons intended to give them equal opportunities, protection of rights and full participation, the view that advances the object of the Act and serves its purpose must be preferred to the one which obstructs the object and paralyses the purpose of the Act. Language of Section 47 is plain and certain casting statutory obligation on the employer to protect an employee acquiring disability during service.

The argument of the learned counsel for the respondent on the basis of the definition given in

Section 2(t) of the Act that benefit of Section 47 is not available to the appellant as he has suffered permanent invalidity cannot be accepted. Because, the appellant was an employee, who has acquired "disability" within the meaning of Section 2(i) of the Act and not a person with disability."

9. In the light of the decision in Kunal Singh's case, it is clear that Section 47 deals with an employee who has acquired disability during service and it is not necessary that he should have suffered 40% disability. The test is whether an employee, after acquiring disability, has become unsuitable for the post he was holding earlier and it is provided by Section 47 that in such a case, the employee could be shifted to some other post with the same pay scale and service benefits and if it is not possible to adjust the employee against any such post, he may be kept in a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier. It seems that the decision of the Supreme Court in Kunal Singh's case was not brought to the notice of the learned Judges who rendered the judgment in A. Sengaan's case (supra).

10. At this stage, we may also refer to the recent decision of the Division Bench in G. Muthu vs. Management of Tamil Nadu State Transport Corporation (Madurai) Limited (supra). In that case, the appellant driver in the respondent Transport Corporation was discharged from service on the ground that since he is colour blind, he is unfit to work as driver. The argument of the Transport Corporation was that colour blindness is not a disability which would fall under Section 2(i) of the Disabilities Act. Rejecting the argument, the Division Bench held that the term 'disability' in Section 47 would encompass not only those contained in Section 2(i), but also those which disabled a person from performing the work which he held immediately prior to acquisition of such disability. It was held that benefits of benevolent legislation could not be denied on ground of mere hypertechnicalities. Consequently, the impugned order of discharge of the workman was set aside and he was declared entitled to the benefit of alternative employment as per Section 47 of the Act.

11. In A. Veeriya Perumal vs. Secretary to Government, Health & Family Welfare Department, Chennai [(2006) 4 M.L.J. 335], a Division Bench of this Court, to which one of us (A.P. Shah, C.J.) was a party, set aside the punishment imposed on an employee as the employee was mentally unsound when he had committed the alleged misconduct. The Bench held that sub-section (1) of Section 47 is clear in terms that

"no establishment shall dispense with or reduce in rank, an employee who acquires a disability during his service". The Bench further held that the right to livelihood, which is an integral facet of the right to life as guaranteed under Article 21 of the Constitution of India, coupled with the protection under Section 47 of the Disabilities Act entitles the employee who was incapacitated during service for continuance of service in suitable alternative post with same scale of pay drawn by him and other service benefits. It was also held that the appellant/employee's right to alternate employment cannot be deprived solely on ground of medical invalidation, as his right is protected under Section 47 of the Disabilities Act.

12. In Metropolitan Transport Corporation Ltd. vs. K. Ravichandran [2005 (2) L.L.N. 869], a Division Bench of this Court held that the words "who acquires a disability during his service" in Section 47 of the Disabilities Act mean that the disability should be acquired while in employment and it is not necessary that it should be acquired while performing his work. Our attention was also drawn to the decision of a Division Bench in The State vs. K. Mohammed Mustafa [2007 W.L.R. 256], where the Division Bench has held that the benefit envisaged under Section 47 of the Disabilities Act can be considered in addition to the benefits contemplated under the Government Order. If in a given case the provisions contained in the G.O. are more beneficial notwithstanding any provision contained in the Act, such beneficial provision of the G.O. can be made applicable, and similarly, if the provisions contained in the Act are more beneficial as compared to the provisions contained in the G.O., benefit of such Act can be made available.

13. In Tamil Nadu State Transport Corporation (Villupuram Division-I) Limited vs. R. Jayakumar [Writ Appeal No.610 of 2007] decided on 13.4.2007, a Division Bench expressly rejected the argument that since the workman has been awarded compensation under the Motor Vehicles Act in a claim petition filed by him before the Motor Accidents Claims Tribunal, including compensation towards loss of earning, he is not entitled to the benefit of Section 47 of the Disabilities Act. It was held that Section 47 of the Act casts a mandatory duty on the part of the employer to provide an alternative employment to an employee who has suffered disability during the course of his employment, and the fact that such an employee has received some compensation under the Motor Vehicles Act is no ground to deny him the alternative employment, to which he is otherwise entitled under the Disabilities Act. It was held that if it is the case of the Transport Corporation that the compensation awarded towards loss of earning is on the higher side, the Corporation is free to

agitate this point in the appeal filed against the award of compensation.

14. In a batch of writ petitions being W.P. Nos.409 of 2004 and other connected matters decided on 6.1.2006, one of us (P. Jyothimani, J.) has held that the purport of the Disabilities Act is to give effect to the Proclamation of Full Participation and Equality of the People with Disabilities in the Asian Pacific Region held in Beijing in the first week of December, 1992, to which our country is a signatory, which was intended with a proclamation in the following terms :

"i) to spell out the responsibility of the State towards the prevention of disabilities, protection of rights, provision of medical care, education, training, employment and rehabilitation of persons with disabilities;

ii) to create barrier-free environment for persons with disabilities;

iii) to remove any discrimination against persons with disabilities in the sharing of development benefits vis-a-vis non-disabled persons;

iv) to counteract any situation of abuse and exploitation of persons with disabilities;

v) to lay down a strategy for comprehensive development of programmes and services and equalisation of opportunities for persons with disabilities; and

vi) to make special provision of the integration of persons with disabilities into the social maintenance."

It was held that in view of the object of the Disabilities Act, the contention that alternate employment will be given as and when vacancy arises and in such an event, the employee would be treated as a new entrant has to be rejected. It was also held that there is no necessity for any certificate from a medical authority as contemplated under Section 2(t) or Section 2(p) of the Disabilities Act.

15. In Anand Bihari Vs. R.S.R.T. Corpn., 1991 (1) LLN 603, which was a decision before the enactment of the Disabilities Act the Supreme Court held that in case of the employees acquiring disability during employment the employer should provide for adequate safeguards to remedy the situation by giving them alternative job or by compensating them in some form for the alround loss they suffered for no fault of theirs. In that case the drivers of the roadways buses of the respondent Corporation who have put in long years of service, during their

routine medical examination were found to have developed defective eyesight and did not have the required vision for driving heavy motor vehicles like buses. The Corporation terminated their services since their eyesight was not of the standard required to drive buses. The Court held that the action of the Corporation was not proper and equitable and was not justified and directed the Corporation to offer them alternative employment or grant compensatory relief for the loss they suffered on account of the premature retirement necessitated by their unfitness to work as drivers. The Court observed that the workmen are not denizens of an animal farm to be eliminated ruthlessly the moment they become useless to the establishment. They have not only to live for the rest of their lives but also to maintain the members of their family and other dependents, and to educate and bring up their children. Their liability in this respect at the advanced age at which they are thus retired stands multiplied. They may no longer be of use to the Corporation for the job for which they were employed, but the need of their patronage to others intensifies with the growth in their family responsibilities. In the circumstances of the case, the Court proposed a scheme to give relief to the workmen involved in that case.

16. In *Narendra Kumar Chandla Vs. State of Haryana*, (1994) 4 SCC 460, which is also a judgment before the enactment of the Disabilities Act, the appellant therein a Sub-Station Attendant of the Haryana State Electricity Board, after being cured of a certain disease after a surgical operation, was found physically unfit by a Medical Board assisted by two Engineers for performing the duties of his original post or equivalent posts. However, having found the employee able to write, the Medical Board suggested him to be considered for any clerical or non-technical post. Rejecting the appellant's plea to order him to be appointed as UDC which carried the same pay scale, but allowing his appeal, the Supreme Court held -

"For a direct recruit to the post of UDC, graduation or post-graduation or law graduation is the minimum educational qualification required apart from other requirements mentioned therein, which the appellant is not possessed of. Hence, the Court cannot give any direction to appoint him as UDC.

Article 21 protects the right to livelihood as an integral facet of right to life. When an employee is afflicted with unfortunate disease due to which, when he is unable to perform the duties of the post he was holding, the employer must make every endeavour to adjust him in a post in which

the employee would be suitable to discharge the duties. Asking the appellant to discharge the duties as a Carrier Attendant is unjust. Since, he is a matriculate, he is eligible for the post of LDC. For LDC, apart from matriculation, passing in typing test either in Hindi or English at the speed of 15/30 words per minute is necessary. For Clerk, typing generally is not a must. Therefore, the State Electricity Board should relax his passing of the typing test and appoint him as an LDC. Since, on the date when he had unfortunate operation, he was drawing the salary in the pay scale of 1400-2300, his last drawn pay and scale of pay have to be protected. He will also be entitled to arrears of salary."

17. In the instant case the respondent workman became unfit for the duty of the driver as he lost knee movement and there is no possibility of regaining his normal movement. It is not disputed before us that the workman is suffering from locomotor disability within the meaning of Section 2(o) of the Disabilities Act. In view of the Supreme Court's decision in Kunal Singh's Case (supra) it is clear that the acquisition of disability is not the same as a person with disability and it was not necessary for the workman to establish that he suffer more than 40% disability. In our considered opinion the decision of the Division Bench in Sengaan's case (supra) does not lay down the correct law.

18. In our opinion, the appeal is devoid of any merit and is accordingly dismissed. The appellant Corporation is directed to reinstate the respondent workman within a period of two weeks from today with pay protection, continuity of service and backwages, as ordered by the learned single Judge. No costs.

ab/sm

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

The Management of Tamil Nadu
State Transport Corporation
(Villupuram Division-III) Ltd.,
Kancheepuram.

+ 1 cc to Mr. G. Muniratnam, Advocate SR No. 41461

+ 1 cc to Mr. D. Hariparanthaman, Advocate SR No. 41425

W.A. No.860 of 2007

AKR(CO)
SR/17.7.2007



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